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No. 07-92

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY J. THOMPKINS

Petitioner,

vs.

LIL' JOE RECORDS, INC., LIL' JOE WEIN MUSIC, INC., AND JOSEPH WEINBERGER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's affirmance of summary judgment for the respondents does not conflict with the Second Circuit's opinion in *In re Waterson, Irving, Berlin*, 48 F.2d 704 (2d Cir. 1931) or the Ninth Circuit's opinion in *Yount v. Acuff Rose-Opryland*, 103 F.3d 830 (9th Cir. 1996), because neither case:

> (A) involved a claimant who had failed to object to a sale of assets during the course of a bankruptcy proceeding, despite notice and opportunity to do so, as here; and
>
> (B) involved a claim against a good faith third party purchaser, as expressly found by the bankruptcy court, as here; and
>
> (C) involved a claimant who waited almost six years to first contest the sale or assert any rights whatsoever, whose claims (even if otherwise valid) would be barred by applicable statutes of limitations and other defenses, as here.

2. Whether the Eleventh Circuit's ruling that rejection of an "executory" contract (assuming that the contract even was an executory contract) neither creates a conflict among the circuits nor involves an important federal question because it is consistent with every case which has considered the subject in that it:

(A) does not void the existence of the contract nor cancel a previous assignment or transfer of an asset in that contract, so that the asset remains an asset of the debtor's estate subject to sale by the estate's trustee, and

(B) gives the non-debtor a breach of contract claim against the debtor's estate, but not against good faith, arms length purchasers who were never parties to the contract.

3. Whether the petitioner's concern that unscrupulous assignees of intellectual property rights will misuse the Eleventh Circuit's opinion by rushing into bankruptcy court to "scrub clean" any obligations to pay royalties to artists is a strawman argument without any basis in fact or law, especially in light of the safeguards provided by the "good faith" requirement and the administration of such proceedings by bankruptcy judges.

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STATUTORY PROVISION INVOLVED

Section 363(m) of the Bankruptcy Code, 11 U.S.C. §363(m), provides:

> §363. Use, sale or lease of property.
>
> * * *
>
> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

STATEMENT OF THE CASE

Jeffrey Thompkins entered into a series of contracts with Luke Records and its related entities, Pac Jam Publishing and Skyywalker Records (collectively, "Luke Records"). The pertinent part of these contracts for present purposes is that each provided that Thompkins sold, assigned, and transferred to Luke Records the musical composition and the worldwide copyright of each song that is at issue here. The March, 30 1990 contract provided:

> The Composers hereby sell, assign, transfer and set over unto the Publisher, its successors and assigns, the said musical composition (lyrics, music and title) and each and every arrangement thereof, together with the worldwide copyright thereof . . .

(Doc. 78, Tab 8, p. 1).

In 1992 and 1993, Thompkins entered into another series of contracts with Luke Records, entitled "Standard Songwriters Contract," which provided in pertinent part:

> Writer hereby sells, assigns, transfers and delivers to the Publisher, its successors and assigns, a certain heretofore unpublished original musical composition ("Composition") written and/or composed by the above named Writer . . . and all copyrights thereof . . . and to have and to hold the said copyrights and all rights of whatsoever nature now and hereafter thereunder . . .

(Doc. 79, pp. 2-3; Doc. 78, Tabs 9-22, Tab 5, pp. 186-191, 199, 207).

One of these two agreements applies to every work at issue in this case.[1] Accordingly, Thompkins transferred ownership of all aspects of the works, including copyrights, to Luke Records no later than 1993. In return, Luke Records agreed to pay Thompkins a royalty on sales of the works.

In 1995, Luke Records was the subject of an involuntary Chapter 7 bankruptcy petition; Luther Campbell (owner of Luke Records) filed a voluntary Chapter 11 bankruptcy petition. The Luke Records proceeding was voluntarily converted to a Chapter 11 proceeding and jointly administered with Luther Campbell's personal bankruptcy action (Doc. 79, p. 4; Doc 78, Tabs 26, 27, 32, 43, and 45).

Thompkins filed a proof of claim on November 22, 1995 in the Luke Records bankruptcy action. Thereafter, he was served with various pleadings and orders filed in the jointly administered bankruptcy proceedings (Doc. 79, pp. 4-5; Doc. 78, Tabs 31 and 36).

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[1] The appendix to the petition includes the 1989 Recording Agreement and Addendum as Appendices E and F, which are not at issue here (App. 61-102a). Rather, the copyright assignments are found in the 1990, 1992, and 1993 agreements.

One of the respondents, Joseph Weinberger,[2] was also a creditor of Luke Records; he filed a proof of claim valued at approximately $400,000. During the bankruptcy proceedings, he submitted a bid to purchase the assets of Luke Records, which was eventually accepted and approved by the bankruptcy court. The most important of these assets was the portfolio of works of Luther Campbell and his famous former musical group, 2 Live Crew. Also included in the assets was the ownership of the works (including copyrights) of lesser known artists, including Thompkins who had transferred ownership of all of his works to Luke Records more than two years earlier.

After notice (including to Thompkins) and a hearing, on March 22, 1996, the bankruptcy court approved the sale of the assets of Luke Records to Weinberger. In doing so, the bankruptcy court expressly found:

> 1. The solicitation of acceptances from holders of claims and interest had been made in the manner required by the Bankruptcy Code.

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[2] Weinberger later formed the other respondents, Lil' Joe Records and Lil' Joe Wein Music. They are referred to collectively as "Weinberger" in this Response.

> 2. The sale of the debtors' assets to Weinberger was in the best interest of the debtors' estates.
>
> 3. Weinberger was a "good faith purchaser" as that term is used in 11 U.S.C. §363(m) and entitled to "all of the protection of a good faith purchaser pursuant thereto."
>
> 4. "All of the assets to be transferred under the Plan, the Letter of Intent or this Order . . . [were to] be transferred free and clear of any interest in such property of an entity other than the Debtors."

(Doc. 78, Tab 35).

The purchase price paid by Weinberger was $800,000 in cash (Doc. 78, Tab 32, Ex. A, p. 8), plus waiver of his existing $400,000 proof of claim. Notably, Weinberger did not purchase any *contracts,* whether of Thompkins or anyone else. Instead, he purchased only certain *assets* – in this case, the ownership of all aspects of musical works, including copyrights.

Thompkins made no objection to the sale to Weinberger, although he had both actual and constructive notice of it, including that included sale of ownership of the works that he had created and assigned to Luke Records. He also did not appeal

from the order which transferred all of the assets to Weinberger "free and clear of any interest," including what he now claims are his works.

Instead, nearly six years later, on March 5, 2002, Thompkins filed the present action in the Northern District of Georgia. That action was transferred to the Southern District of Florida, where the court granted summary judgment in favor of the respondents, and the Eleventh Circuit affirmed.

RULE 15.2 STATEMENT

Rule 15.2 requires that the brief in opposition "should address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted." Pursuant to Rule 15.2, respondents address the following misstatements in the petition:

1. As discussed more fully in the Argument, the petition asserts a conflict between the Eleventh Circuit's ruling below and decisions of the Second and Ninth Circuits on the "intertwining" of copyrights with royalty obligations. There is, however, no such conflict.

2. As discussed more fully in the Argument, the petition asserts that the Eleventh Circuit's ruling below conflicts with the Third Circuit's rulings on the effect of rejection of "executory" contracts. First, these contracts were not

"executory" as to the aspect at issue; rather, a fully complete transfer of ownership of the assets from Thompkins to Luke Records had occurred more than two years before the filing of the bankruptcy action. Second, regardless of whether these were "executory" contracts, the Eleventh Circuit's ruling is not contrary to rulings of the Third Circuit or any other circuit. In fact, every circuit's decisions which have considered the subject, including the Eleventh Circuit's ruling below, are in agreement on this subject, and no court has *ever* approved of an action such as the present one against a good faith third party purchaser.

3. On page three, petitioner misleadingly asserts that he "gave up" his rights to the musical compositions. This was a complete transfer of ownership; it was not a license.

4. On page three, petitioner references the Peter Jones lawsuit, and connects Weinberger to that suit. It is indisputable that all of the facts at issue in the Jones lawsuit had nothing to do with Weinberger, who had not even begun working at Luke Records at the time of the events that resulted in the Jones claim. Weinberger was never CEO of Luke Records. Further, there is no evidence that Weinberger was the instigator of the involuntary petition for bankruptcy against Luke Records, as stated on page three.

5. On pages three and four, petitioner seeks to tie together the assumption of executory contracts

in the Plan of Reorganization and an alternative of proceeding against Weinberger and others to prosecute preference claims. In fact, these were not tied. Weinberger, for fair value and at arms length, paid $800,000 plus relinquished a claim of $400,000 (not "approximately $300,000" as stated on page four of the petition) for the assets, and this was approved after notice and hearing by the bankruptcy court.

6. On page five, petitioner references that the Plan "also involved looking past an approximately $300,000 preference or fraud claim against Weinberger identified by the Luke Records bankruptcy estate examiner." This is false. While the examiner did consider a possible preference claim (which the trustee, as approved by the bankruptcy court, determined to waive as part of the Plan), at no time did the examiner mention that Weinberger had even potentially committed any fraud. This salacious allegation is made here, as in the district and appellate courts, without any support anywhere in the record.

7. On page five, petitioner references Weinberger's deposition testimony that he has generated between $10 Million and $20 Million in revenue from the assets that he purchased and incorrectly infers that a significant portion of that revenue involves Thompkins' work. However, petitioner did not dispute below that the vast majority of that revenue derives from 2 Live Crew works in which Thompkins had no part. The unrebutted expert testimony established that the

maximum amount of royalties earned from his works (before deductions for costs allowed in the contracts) was approximately $121,000, had Thompkins prevailed. Deductions for costs would have reduced even this amount to a negative position. In other words, even if Thompkins prevailed in somehow enforcing his contracts with Luke Records against the third party good faith purchaser of the assets, Weinberger, he would not have sustained any loss.

ARGUMENT

I. PETITIONER'S CONCERN THAT ASSIGNEES WILL USE BANKRUPTCY TO "SCRUB CLEAN" ROYALTY OBLIGATIONS IS UNFOUNDED.

The primary concern raised by Thompkins is that entities who obtain ownership of intellectual property in return for an obligation to pay royalties will somehow misuse the Eleventh Circuit's opinion to avoid the contractual obligation to pay royalties. No reasonable person could believe that on-going viable entities will be rushing into the bankruptcy system for the sole purpose of avoiding royalty payments.

The present case, in fact, is a prime example of the difficulties presented by any such attempted misuse. The bankrupt entity – the entity that had contractually agreed to pay the royalties – was, after all, Luke Records, not Weinberger. Luke Records did not enter bankruptcy to avoid paying royalties; at first, it was involuntarily forced into bankruptcy

because it was insolvent. Certainly, the bankruptcy proceedings did not assist Luke Records in its future business endeavors. Luke Records is now out of business. There is no evidence that the bankruptcy of Luke Records was some sort of subterfuge to avoid its royalty obligations. Indeed, there were limited royalty obligations on the major works to start with, as the major asset of Luke Records was its owner's own works – the works of 2 Live Crew – whose principal author, Luther Campbell, no longer has any rights to royalties arising from his own works (just like Thompkins). It defies common sense to think that Luke Records entered the bankruptcy system in order to avoid royalty payments.

It similarly defies logic to suggest that others will do the same, especially if they have Luke Records' example before them. Furthermore, the bankruptcy court which would have jurisdiction over any such attempt would have the ability to thwart it. That is one of the major flaws in Thompkins' assertion.

Petitioner relies heavily on *In re Waterson, Berlin & Snyder Co.*, 48 F.2d 704 (2d Cir. 1931), but fails to appreciate its essential lesson. In that case, the composers objected to a proposed sale of assets, free and clear, *in the bankruptcy court*, and appealed from a decision by the bankruptcy court against them. Thus, the bankruptcy court system itself was the check against the purported potential misuse of the system.

Here, by contrast, despite notice of the proposed sale, Thompkins did not object to the sale. He took no action whatsoever during the pendency of the bankruptcy proceedings, other than to file his proof of claim. The Debtors' Estates objected to Thompkins' proof of claim. He never responded. The bankruptcy court entered orders giving persons whose contracts had been rejected to file claims for breach of contract damages; Thompkins never filed such a claim. Thompkins did not tell the bankruptcy court that he believed that ownership of the copyrights could not be separated from the obligation to pay royalties. He did not preserve an appeal from the bankruptcy court's order approving the sale free and clear to Weinberger. He did not appeal.

"When a bankruptcy court approves the sale of an asset of the debtor, a person who has notice of the sale cannot later void it on the ground that he is the asset's real owner." *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 930 (7th Cir. 2003). Further, lack of objection to a proposed sale where there has been notice (the existence of notice is undisputed in this case) constitutes consent to the sale free and clear pursuant to 11 U.S.C. § 363(m). *See, e.g., FutureSource LLC v. Reuters, Ltd*, 312 F.3d 281 (7th Cir. 2002), *cert. denied*, 538 U.S. 962 (2003).

Petitioner failed to state an important federal question of either copyright law or bankruptcy law. There is no basis for this Court to exercise the extraordinary power of review over this petition.

II. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING COPYRIGHT/ROYALTY LAW AND NO GROUND FOR ALLOWING THE PETITION.

Rule 10(a) provides that one of the grounds for this Court's exercise of its discretion to allow a petition is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Here, there is no conflict.

Petitioner claims that the Second Circuit's opinion in *In re Waterson, Berlin & Snyder Co.*, 48 F.2d 704 (2d Cir. 1931), and the Ninth Circuit's opinion in *Yount v. Acuff-Rose-Opryland*, 103 F.3d 830 (9th Cir. 1996), conflict with the Eleventh Circuit's opinion here, so this Court should grant review. Not only is there no conflict, but the *Yount* case actually supports the Eleventh Circuit's ruling. Certainly, there are no "compelling reasons" why this Court should accept review.

Unlike the present case, *Yount* did not involve a bankruptcy court ruling at all, nor was there an assertion of a claim against a good faith third party purchaser, such as Weinberger. It was not a dispute about whether royalties were owed by the third party purchaser, but rather a dispute regarding which of two parties (who had contracted with each other) were entitled to *receive* those royalties, where one of them had assigned his royalty rights to the other.

Petitioner relies upon the Ninth Circuit's citation to *Waterson* and one sentence which refers to ownership and royalty obligations being "inexorably intertwined," but ignores the rest of the opinion. Indeed, even the sentence relied upon by petitioner demonstrates that the *Yount* decision is consistent and not in conflict with the Eleventh Circuit's opinion in this matter:

> To that extent, ownership and obligation are inexorably interwined, *but that does not increase the royalty holder's rights or protections beyond those set forth in the contract.*

Yount, 103 F.3d at 834 (emphasis added). Elsewhere, the court notes:

> Moreover, holding a royalty interest does not bespeak an interest in the underlying copyright itself – a royalty is simply an interest in receiving money when the owner of the copyright exploits it.
>
> * * * *
>
> When Yount transferred the underlying copyright, he obtained a contractual right to royalties. *He no longer had a copyright*; he had a mere contractual right – a promise by 4 Star that it would make royalty payments. *At that*

> *point federal copyright law essentially ceased to be concerned with how that contractual royalty right or assignments of it would be enforced.*
>
> * * * *
>
> [Yount] now seeks to cast himself in the mold of a put-upon author, who should have the special protection of the Copyright Act to save him from his own lack of discretion. But authors are not "wards under guardianship of the law." *Fred Fischer Music Co.*, 318 U.S. at 657, 63 S.Ct. at 779. Indeed, we along with the Supreme Court, assume that they would resent being treated as if they were.

Yount, 103 F.3d at 834-37 (emphasis added).

This does not conflict with the Eleventh Circuit's decision below. The Eleventh Circuit rejected Thompkins' assertion that he was entitled to special protection from his own decision to transfer ownership of his works to Luke Records, rather than any of the other myriad of possible contractual arrangements into which he could have entered. Indeed, if artists are concerned with the potential for "scrubbing clean" of their works, they can enter into a mere license rather than a transfer of ownership. Control is always in the artist's own hands.

Similarly, there is no conflict with the *Waterson* decision. As noted earlier, the artist in *Waterson* made his objection in the bankruptcy court proceeding itself, whereas Thompkins had made no such assertion, as the Eleventh Circuit's opinion specifically noted. Unlike the *Waterson* parties, Thompkins never sought to rescind his Luke Records contracts in the bankruptcy court, nor did he avail himself of the opportunity to seek damages that was provided to him on more than one occasion by orders of the bankruptcy court. As noted by the Eleventh Circuit:

> If Thompkins wished to seek recission of his recording agreements, he should have done so in a claim against Luke Records, either before or as part of the bankruptcy proceedings. That ship has long since sailed, so Thompkins' claim of rescission here against Lil' Joe must fail as a matter of law.

Thompkins v. Lil' Joe Records, 476 F.3d 1294, 1315 (11th Cir. 2007) (App. 38a).

III. THE PROPOSITION THAT INTELLECTUAL PROPERTY RIGHTS ARE SOMEHOW DIFFERENT FROM OTHER PROPERTY RIGHTS UNDER SECTION 363 IS NOT CORRECT.

In neither *Yount* nor *Waterson*, nor in any other case cited by Thompkins, was there an issue regarding rights against a good faith third party

purchaser, such as respondents. Therefore, not only is there no conflict between the circuit courts, but there is no important federal question justifying review by this Court.

Assume that a grocery store files a bankruptcy petition. The grocery store is filled with goods from various vendors – cereal boxes, orange juice cartons, and frozen pizzas, all on installment contracts or on unpaid-as-yet invoices as of the time of the bankruptcy. None of the vendors have security interests in the goods that they sold in return for a promise of future payments.

Upon the filing of the bankruptcy petition, none of these vendors have a right to enter into the store to repossess the goods that they sold to the grocer; title does not revert to the vendors when the grocer fails to pay or files for bankruptcy, unless the vendors' contracts with the grocer so provide. Moreover, when a good faith third party purchaser offers to buy the store and all of the goods in it, the purchaser's purchase price will then become part of the assets of the debtor's estate, to be distributed equitably by the bankruptcy court to the vendors/creditors along with all of the other creditors. The vendors cannot rescind the contracts. And, if the bankruptcy court orders that the purchase is "free and clear" pursuant to Section 363, the vendors do not have any rights against the third party purchaser.

Indeed, that is the entire point of Section 363 – to encourage better bids for assets of the debtor's estate by third parties, to maximize the value of the estate for the benefit of all of the creditors, and to give purchasers comfort that, when approved by the bankruptcy court, they take title to the assets "free and clear." Petitioner's argument undermines the very purpose of the statute, and renders the phrase "free and clear of any interest" meaningless. His attempt to re-open the bankruptcy proceedings almost six years after the completion of the asset sale further undermines the concepts of finality and protection of good faith third party purchasers that are part of the fabric of the Bankruptcy Act.

Petitioner, relying on *Yount* and *Waterson*, asserts that this should be different as to intellectual property rights, but presents no reason (legal or otherwise) why such rights should be treated differently. As *Yount* and this Court have pointed out, creators of intellectual property are not special wards of the law, entitled to special rights different from creators of other goods and services. *Yount*, 103 F.3d at 837, citing *Fred Fischer Music Co. v. M. Witmark & Sons,*, 318 U.S. 643, 657 (1943).

There is nothing unique or important about the issues in this case that call for review by this Court.

IV. PETITIONER'S "EXECUTORY" CONTRACT ASSERTION IS A RED HERRING AND DOES NOT CREATE AN IMPORTANT QUESTION OR A CIRCUIT CONFLICT.

Relying on the Ninth Circuit's opinion in *In re Qintex Entertainment*, 950 F.2d 1492 (9th Cir. 1989), petitioner asserts a circuit conflict in the Eleventh Circuit's treatment of "executory" contracts. The decision below, however, is consistently on all fours with the *Qintex* case and every other decision which has considered the issue.

In *Qintex*, Hal Roach Studios was the debtor. Hal Roach Studios had entered into a contract with actor George C. Scott, under which Scott was to provide acting services, and Roach Studios was to own all rights to the works in which Scott had acted. Roach Studios agreed to pay Scott a royalty on future revenue arising from the works. When Roach Studios filed for bankruptcy, it sought to sell its rights in the works. The court held that because Scott (like Thompkins) had completed all of his services, the fact that the debtor still owed royalties to Scott did not render the contract "executory." Therefore, the debtor was properly allowed to sell the assets to a third party purchaser "free and clear" under Section 363.

More importantly, the case law is uncontroverted that even if a contract is executory, and if that executory contract is "rejected," the remedy for the non-debtor is not rescission, or

voiding, or cancellation of the contract. As the Eleventh Circuit held, citing authority from several different jurisdictions, the remedy is an unsecured breach of contract claim against the debtors' estate (not against the third party purchaser). *Thompkins*, 476 F.3d at 1305-08 (App. 20-24a). Not only is there not a conflict between circuits, Thompkins cannot cite and has not cited a single case from any jurisdiction which has *ever* held otherwise. This, too, does not present a question worthy of review by this Court.

CONCLUSION

Respondents respectfully request this Court to deny the petition for a writ of certiorari, and for such other relief as this Court deems proper.

Respectfully submitted,

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